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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

GRETTA ROBERTS, Plaintiff and Appellant, v. PATRICK CALHOUN, Defendant and Appellant.	H023321 (Santa Clara County Super. Ct. No. CV782686)

Attorney Patrick Calhoun appeals from a judgment after a jury trial in a legal malpractice action. The jury found that Calhoun was negligent in his handling of Gretta Roberts's bankruptcy action, causing Roberts to lose her home in a foreclosure sale, and awarded Roberts $177,784 in damages. Roberts has filed a cross-appeal.

During trial, the court initially granted, then later denied, Roberts's motion to present evidence of emotional distress damages. This appeal raises several issues relating to Roberts's emotional distress claim. Calhoun alleges that the trial court erred in allowing Roberts to testify regarding her family history before reversing its ruling on the emotional distress damages. Roberts asserts that the trial court erred in denying her motion to amend her complaint to state a cause of action for intentional infliction of emotional distress, coupled with a prayer for punitive damages, and when it ruled that she

could not recover for negligent infliction of emotional distress in a legal malpractice action.

Calhoun also challenges the sufficiency of the evidence of Roberts's motel, travel, and storage expenses and asserts that Roberts was only entitled to prejudgment interest from the date of the filing of her complaint, not the date of the foreclosure. Calhoun asserts that the judgment should be reversed because a prospective juror stated that she thought she knew him because she worked for a company that handled his malpractice insurance. Lastly, Calhoun asserts that the trial court erred in instructing the jury regarding the elements of Roberts's legal malpractice claim.

In her cross-appeal, Roberts claims that the trial court erred in excluding evidence of the tax consequences of her damages award and in excluding evidence of the fair market value of the property at the time of trial. She also asserts that the trial court erred in denying her post-trial motion for attorney fees. We find no error and will affirm the judgment.

FACTS

First Bankruptcy Petition

By late 1996, Gretta Roberts was several months behind on the mortgage payments on her home in San Jose. On November 14, 1996, her lender issued a default notice and initiated foreclosure proceedings on the property. By that time, Roberts was $7,354.34 in arrears. Roberts wanted to keep her house and sought the advice of a bankruptcy attorney, Patrick Calhoun. In mid-December 1996, Calhoun advised Roberts to file for Chapter 13 bankruptcy. He recommended that she delay filing the bankruptcy petition until after January 1, 1997, in order that the next mortgage payment might be included in the bankruptcy plan, thereby increasing Roberts's cash flow. As it turns out, the petition was not filed until February 7, 1997.

Roberts had purchased the property in 1985 for $107,000. When she filed for bankruptcy in February of 1997, she had lived in the house for 11 to 12 years. During that time, she refinanced the first mortgage and took out second and third mortgages. By the time she filed for bankruptcy, she owed $168,000 on the three mortgages. Roberts advised Calhoun that the property had been appraised for $200,000 in 1994 and inquired whether she should obtain a new appraisal. He said it was not necessary and used the $200,000 figure in the bankruptcy petition.

Roberts, who was self-employed as a dog groomer, had gotten behind on her mortgage payments before. She admitted to being two or three payments behind in 1992, in 1993, and again in 1995. On these prior occasions, however, she was able to catch up and pay off the arrearages.

In addition to her mortgage debt, Roberts had approximately $32,000 in unsecured debt. Under the plan proposed in Roberts's bankruptcy petition, she was to pay approximately $450 per month to cover the arrearages on her mortgage and the unsecured debt. Roberts had proposed what is known as a "five-percent plan." Under that plan, the unsecured creditors would receive five percent of the amounts owed by Roberts. In addition, while in bankruptcy, Roberts would have to remain current on any payments due on her mortgages, on her car loan, and any new debt incurred.

At the time she filed for bankruptcy, Roberts had not filed income tax returns for 1995 or 1996. Calhoun referred her to an accountant, who determined that her tax debt was $7,700.

By the summer of 1997, Roberts was having trouble making the payments due under the bankruptcy plan. She claimed her finances were so "tight," that she could not afford to buy a can of Coke. She therefore decided to give up her pick-up truck and allow it to be repossessed. Roberts failed to make the mortgage payment that was due in

September or October 1997.[1] At that point, she risked having her bankruptcy petition dismissed unless she made up the payment in two weeks. Calhoun told her she could either make up the mortgage payment or allow the bankruptcy petition to be dismissed and then file a second petition in a few months. Since the plan had not been confirmed, Roberts was due a refund on the money she had paid to the trustee. Calhoun suggested that Roberts extend the filing date on the second bankruptcy to the last possible minute, so that she could save the money that she would otherwise pay toward the mortgages to cover her taxes for 1997 and to make it easier to pay the mortgage and bankruptcy plan payments after she filed the second bankruptcy. Roberts agreed to allow her first bankruptcy action to be dismissed.

Second Bankruptcy Petition

On December 6, 1997, Roberts received a notice that the property would be sold by her lender on January 6, 1998. She brought the notice to Calhoun. On December 16, 1997, he prepared a second bankruptcy petition, which was filed on January 5, 1998 at 4:05 p.m., the afternoon before the scheduled sale.

After filing the second petition, Calhoun received a notice of the meeting of creditors, which was set for February 23, 1998. The notice stated that there would be a hearing to confirm the plan on March 2, 1998, unless an objection was filed, in which case the court would conduct a prehearing conference on April 20, 1998.

The bankruptcy trustee objected to the second plan.[2] According to Calhoun, the objections were minor. He intended to correct them by amending the plan. After the meeting of creditors, Calhoun told Roberts that he would take care of the amendments.

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[1] The record is unclear as to whether she missed the September or the October payment.

[2] The Trustee objected on the grounds that there appeared to be approximately $292 per month in disposable income (the amount of the truck payment) that was not

Since the bankruptcy trustee had objected to the plan, it could not be confirmed on March 2, 1998, and Calhoun was required to attend the prehearing conference. Calhoun failed to file a prehearing conference statement, which was due 14 days before the conference. Calhoun admitted had gotten behind on the file and had not yet done the amendments. Calhoun assumed that since the amendments had not been done, the case would be continued at the prehearing conference. He also decided that it would be cheaper to take the $100 sanction than to file the statement.

Calhoun attended the April 20, 1998 prehearing conference, but did not identify himself on the record. At the conference, the court read off the names of a number of cases, including Roberts's case, that were going to be continued because of unresolved objections, with an order that the amendments necessary to resolve the objections be filed within 30 days or the case would be dismissed. Calhoun heard the court's order, but did not make a good note of it. He forgot about the 30-day deadline and failed to file the amendments on time.

On May 29, 1998, the bankruptcy court dismissed Roberts's case because of the failure to file the amendments and dissolved the restraining order that protected Roberts's property from foreclosure. On or about June 1, 1998, Calhoun prepared the amendments to Roberts's second bankruptcy plan. Roberts signed them on June 2, 1998.

The evidence conflicts as to when Calhoun first learned of the dismissal of the second bankruptcy petition. Calhoun testified that when Roberts was in his office on June 2, 1998, to sign the amendments, he knew that the second bankruptcy petition may have been dismissed and told Roberts that there may be a problem. However, he did not have Roberts sign a new bankruptcy petition at that time. Calhoun also testified that he

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being pledged to the creditors, that information regarding the truck had been omitted from the petition, and that Roberts was claiming an exemption that did not apply. Calhoun admitted that he had made some mistakes when preparing the second petition. He forgot to take the car payment out of Roberts's budget and off of the exemption list.

got notice of the dismissal on either June 2, 1998, or June 3, 1998, right after Roberts signed the amendments. The court's written notice of dismissal was filed on June 4, 1998. Calhoun could not recall how he first got notice of the dismissal, whether it was from the court's written notice or from a telephone call with the trustee. Calhoun did not keep notes of his conversations with his clients and admitted that he was not in the habit of making notes about many things in his law practice.

The testimony also conflicts as to what Calhoun told Roberts after he learned of the dismissal. Calhoun testified that he contacted Roberts by telephone and told her about the dismissal. He admitted that the dismissal was his fault and offered to file another bankruptcy petition, at his expense. He told Roberts that she no longer had bankruptcy protection and that she should come in right away to sign another bankruptcy petition. He also asked her to contact the foreclosure agent to find out the date of the foreclosure sale.

According to Roberts, she first learned of the dismissal when she received a letter from the trustee, advising her that her case was dismissed. She called Calhoun, who told her that he knew about the dismissal and that "he wanted it that way, that it was better for the creditors." She was not satisfied by his response and called the court. A clerk told her that the dismissal was due to Calhoun's failure to file some papers. Roberts called Calhoun back. She did not tell him what she had learned. He told her that he was preparing the paperwork for another bankruptcy petition and would call her when the papers were ready. According to Roberts, Calhoun never asked her to find out the date on the foreclosure sale.

Calhoun thought the bankruptcy stay remained in effect for seven to 14 days after the dismissal. The parties had difficulty contacting one another after learning of the dismissal. Calhoun finally spoke to Roberts on July 8, 1998, and scheduled a meeting for the following day. Roberts cancelled and rescheduled that meeting twice. She went to Calhoun's office on July 13, 1998, and signed the third bankruptcy petition.

Roberts made all of the payments due under her second bankruptcy plan.

Sale of Property

After signing the third petition, Roberts went straight home. She found a note on her door advising her that the property had been sold. The parties later learned that the property had been sold on July 6, 1998. Calhoun tried to get the buyer to set aside the sale, to no avail. He later suggested to Roberts that it was good thing that the house had been sold since she no longer had to struggle to make the mortgage payments. He also suggested that once the house was gone, she could file for Chapter 7 bankruptcy and offered to handle the bankruptcy for her for free.

Roberts moved out of her home on August 17, 1998. She did not have a place to live and could not afford to rent another house. She alternated between staying in motels and sleeping in her dog grooming shop for about a year. She could not afford to live in San Jose and moved in with her brother in Tracy for two months. She rented a room from friends in Tracy for five months and later moved to an apartment, which she had for a year. At the time of trial, she was back living with her brother. She continued to work in her dog grooming business in Cupertino and commuted from Tracy.

Malpractice Action Against Calhoun

Roberts sued Calhoun for legal malpractice. The case went to trial on May 21, 2001. Roberts's standard of care expert, James "Ike" Shulman, testified that Calhoun breached the standard of care for bankruptcy attorneys in Santa Clara County in a number of ways. He opined that several errors that Calhoun made in the first bankruptcy petition fell below the standard of care, but that those errors could have been remedied. Shulman also testified that it was below the standard of care to dismiss the first bankruptcy because Roberts was having trouble making her truck payments and that there were less drastic measures available, like modifying the plan. Shulman testified

extensively about Chapter 13 bankruptcies. He stated that modifications are common and are not scrutinized in the same way as original plans.

Shulman also testified that it was below the standard of care for Calhoun not to file a prehearing conference statement, not to speak up on Roberts's behalf at the prehearing conference, and not to file the amendments after the conference. According to Shulman, Calhoun also breached the standard of care by asking Roberts to obtain the sale date from the foreclosure agent after the second bankruptcy was dismissed. He stated that an attorney should not take any action that harms the client's position and opined that Calhoun had a greater duty in this case, since the case had been dismissed due to his errors. Calhoun should have been more proactive and obtained the date from the foreclosure company himself. There were other steps Calhoun could have taken upon dismissal of the action, including filing a motion to vacate the dismissal or contacting the lender and proposing and alternative work-up. In Shulman's opinion, Calhoun's failure to take such measures fell below the standard of care.

Roberts also relied on the testimony of Terri O'Neal, a real estate appraiser. O'Neal testified that as of July 1998, Roberts's property was worth $280,000 and that Roberts's lender had had the property appraised for $240,000 in January of 1998.

Calhoun's standard of care expert, Charles Greene, testified that it was not below the standard of care for a Chapter 13 bankruptcy attorney to have the client ascertain the new foreclosure date, as Calhoun had done here. However, it was not prudent to tell the client to call the foreclosure agent and then not have any further contact with the client for a month. Greene opined that it was below the standard of care not to set a time for the next contact with the client and stated that he would have diaried this matter for seven days to follow up with Roberts. If he were unable to reach the client at that point, he would call the foreclosure agent himself. If he were unable to persuade the client to come in to sign the bankruptcy papers, he would go out to the client's home.

Greene also opined that a motion to vacate the dismissal of the second bankruptcy petition was not a viable remedy in Roberts's case, since the judge to whom the case was assigned generally does not grant such motions. The better course would have been to file another bankruptcy petition, as Calhoun attempted to do. With a fair market value of $280,000 for the property, it would have been difficult to get the court to approve a 5 percent plan. Because of the equity in her house, Roberts would have been required to pay 100 percent of her unsecured debts. With regard to damages, the most Roberts could recover in his opinion for the loss of house, was the $50,000 homestead exemption due to the extent of her debt.

At trial, Calhoun testified that he did not think it was his fault that Roberts lost her home because she could have called and gotten the date of the foreclosure sale. He then conceded that it was partially his fault. He also testified that he had no reason to doubt the opinions of the experts and that they were more knowledgeable than he was about bankruptcy.

Roberts testified as to various expenses she incurred as a result of losing her home, including motel charges, storage fees, and increased transportation costs. In closing, she argued that she was entitled to the value of the equity in the property ($280,000 less $168,000 in liens, or $112,000), $33,500 in interest, $14, 334 for motels costs, $14,280 in increased commute costs, and $11,890 for storage fees. Roberts's asked for an award of $185,974.

In closing, Calhoun admitted that he made mistakes and asserted that the issues in the case were the standard of care, causation, Roberts's comparative negligence, and damages. As to Roberts's comparative negligence, Calhoun argued that she had given him false information regarding the value of the house, her income, and what she would be able to do in bankruptcy. Calhoun also asserted that Roberts failed to obtain the foreclosure date from the lender and failed to attend appointments with him to sign the third bankruptcy petition. He argued that in order to recover in the malpractice action,

Roberts would have to prove that she would have successfully completed the bankruptcy plan. He outlined her struggles to make the mortgage payments and financial difficulties over the years. He suggested that the most she would be able to recover was $43,000 (the $50,000 homestead exemption, less $7,00 to cover tax liens).

The jury found that Calhoun had been negligent, that Roberts was not comparatively negligent, and awarded Roberts $177,784.

Calhoun filed a motion for new trial, asserting various errors during trial and that the damages were excessive. Roberts opposed the new trial motion. Roberts filed a motion for attorney fees on the grounds that Calhoun had refused to admit certain facts in his responses to requests for admission that Roberts later proved at trial. (Code Civ. Proc., § 2033, subd. (*o*).) The court denied Calhoun's new trial motion and granted Roberts's attorney fees motion in small part, awarding her $79 in costs.

Calhoun appeals. Roberts raises several additional issues in a cross appeal.

DISCUSSION

I. Issues Raised in Appeal and Cross-Appeal Regarding Emotional Distress

Roberts filed a Judicial Council form complaint that alleged a single cause of action for general negligence in the form of legal malpractice. On the first day of trial, Roberts moved to amend her complaint to add a cause of action for intentional infliction of emotional distress coupled with a prayer for punitive damages. Roberts claimed Calhoun knew that she had a history of depression, that her business had been having trouble, and that it was a hardship for her to make the payments required in bankruptcy. She argued that to subject her to the loss of her only asset, in view of her history, was despicable conduct that entitled her to an award of punitive damages. She also asserted that she was entitled to damages for intentional infliction of emotional distress because Calhoun had lied in his deposition in the malpractice action. Calhoun objected to the

amendment on the grounds that it was untimely and that he was not prepared to meet this new cause of action. The court denied the motion as untimely.

Immediately thereafter, Roberts moved in limine to amend her complaint to include a claim for emotional distress damages on a negligent infliction of emotional distress theory. She argued that emotional distress damages were an appropriate element of damages because Roberts had lost her home, which was something of sentimental value, and that emotional distress damages were encompassed within her claim for general damages. Calhoun argued that emotional distress damages should not be allowed because they are not recoverable in a legal malpractice action, citing *Camenisch v. Superior Court* (1996) 44 Cal.App.4th 1689 (*Camenisch*), and that there was nothing in the complaint to alert him to the fact that Roberts would be claiming emotional distress damages. The court granted Roberts's motion to pursue a cause of action for negligent infliction of emotional distress.

At trial, Roberts testified that her family was "very dysfunctional" when she was growing up. Calhoun objected to the testimony on the grounds of relevance and that Roberts's difficulties growing up were not chargeable to Calhoun. Roberts argued that it was relevant to her claim for emotional distress damages. The trial court permitted additional testimony on the issue as background. Roberts then testified that her father was an alcoholic, that her mother kept the peace, and that because her father traveled a lot, her brothers were "kind of out of control for [her] mom." She also testified that her brothers beat up on her a lot and that her father was verbally abusive. Roberts gave one example of her father's verbal abuse. She testified that he put a can of Coke in front of her with a glass of milk and a glass of water and then asked her which one she wanted. When she took the milk, he hit her because that was the wrong answer.

Upon hearing this testimony, the court called counsel to the bench for an offer of proof. After hearing the offer of proof, the court struck the testimony regarding the Coke,

the milk, and the water as more prejudicial than probative under Evidence Code section 352.

The following morning, after an unreported chambers conference, the court instructed the jury that Roberts's testimony with respect to her early life would be stricken in its entirety and that emotional distress damages were no longer an element of the case.

Later that day, outside of the presence of the jury, the court made a statement on the record regarding the discussions held during the chambers conference and allowed the parties to state their arguments regarding emotional distress on the record. Roberts wanted to present evidence of one more specific incident of verbal abuse by her father and evidence that she was physically abused by her father and physically and sexually abused by her brothers. The court reviewed a report from Roberts's therapist. The court denied Roberts's claim for damages for negligent infliction of emotional distress on the grounds that such damages were barred in a legal malpractice action, that they had not been specifically pleaded, and on the basis of Evidence Code section 352.

On appeal, Calhoun argues that the trial court erred in admitting any evidence of emotional distress and that the court should have denied Roberts's motion to add a cause of action for negligent infliction of emotional distress at the outset. He asserts that emotional distress damages are barred in a legal malpractice action, citing *Camenisch, supra,* 44 Cal.App.4th 1689. He also argues that the claim for emotional distress damages should have been denied because not specifically pleaded and because it was not presented until the first day of trial and was therefore prejudicially untimely. Even though the trial judge ultimately agreed with Calhoun and struck the testimony regarding emotional distress, Calhoun argues that the court's admonition to the jury was insufficient to overcome the prejudice that had resulted from allowing the testimony to be presented.

In her cross-appeal, Roberts argues that it was an abuse of discretion for the trial court to deny her motion to amend the complaint to add a cause of action for intentional infliction of emotional distress. She asserts that Calhoun was reckless in failing to keep the foreclosure notices that Roberts brought to him and in failing to recall that he had not asked Roberts to ascertain the new foreclosure date. In addition, in the instant litigation, he had misrepresented when the notice of default and the notice of sale had been recorded.

Roberts also argues that she was entitled to damages for her emotional distress in her legal malpractice cause of action because she had asked Calhoun to protect her home and that since her case involved something more than a mere economic loss, the rule stated in *Camenisch* does not apply. We begin by addressing the latter contention.

A. Roberts's Claim For Emotional Distress Damages In Her Legal Malpractice Action

We review a trial court's decision to grant or deny leave to amend the pleadings for an abuse of discretion. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.)

" 'The fact that emotional distress damages may be awarded in some circumstances (see Rest.2d Torts, § 905, pp. 456-457) does not mean they are available in every case in which there is an independent cause of action founded upon negligence.' (*Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, 7 . . . (*Merenda*).) 'No California case has allowed recovery for emotional distress arising solely out of property damage' (*Cooper v. Superior Court* (1984) 153 Cal.App.3d 1008, 1012 . . .); moreover, a preexisting contractual relationship, without more, will not support a recovery for mental suffering where the defendant's tortious conduct has resulted only in economic injury to the plaintiff. (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1040, fn. 1 . . . ; *Mercado v. Leong* (1996) 43 Cal.App.4th 317, 324 . . . [emotional distress damages are unlikely when the interests affected are merely economic]; *Camenisch*[*, supra,*] 44 Cal.App.4th 1689, 1691 . . . [emotional distress damages are not recoverable when

attorney malpractice leads only to economic loss].)" (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 554-555 (*Erlich*).) " '[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by [breach of the independent duty]. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests. [Citations.]' [Citations.]" (*Id.* at p. 555 citing *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 985.)

California courts have considered the issue of damages for emotional distress due to attorney malpractice on several occasions. Generally, our courts have held that the client may not recover for emotional distress if the attorney's negligence directly caused economic damage or loss of property alone. (*Camenisch, supra,* 44 Cal.App.4th at p. 1694.)

"The question was thoroughly explored in *Merenda, supra*, 3 Cal.App.4th 1, a legal malpractice action in which the plaintiff sought damages for the severe emotional distress she suffered when her attorney's negligence caused the loss of expected damages from her claim for sexual assault and battery." (*Erlich, supra*, 21 Cal.4th at p. 556.) The *Merenda* court stated: "The duty to avoid negligence in the practice of law is imposed to protect a client from the legal consequences of a miscarriage of justice. The interest protected is typically economic, as in the loss of damages or the imposition of damages. Whether recovery of damages for emotional distress attributable to legal malpractice should be allowed must be considered in light of the primary interest protected by the duty to avoid malpractice. (See *Holliday v. Jones* [(1989)] 215 Cal.App.3d [102,] 119 [(*Holliday*)] [malpractice caused a criminal conviction and imprisonment].) Where the interest of the client is economic, serious emotional distress is not an inevitable consequence of the loss of money and, as noted, the precedents run strongly against recovery. For these reasons the issue is not resolved in plaintiff's favor simply because

she has pleaded an otherwise actionable claim of legal malpractice." (*Merenda, supra*, 3 Cal.App.4th at p. 10.)

As part of its analysis, the *Merenda* court examined the traditional factors used to determine the existence of a duty: " 'the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to [the plaintiff], the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm[,]' [citation] . . . [citation] . . . 'the extent of burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.' [Citation.]" (*Merenda, supra*, 3 Cal.App.4th at p. 10.)

The court observed: "It is true that the 'transaction,' a contract for legal services, was intended to affect the plaintiff. However, the foreseeability of serious emotional harm to the client and the degree of certainty that the client suffered such injury by loss of an economic claim are tenuous. Litigation is an inherently uncertain vehicle for advancing one's economic interests. The expectation of a recovery is rarely so certain that a litigant would be justified in resting her peace of mind upon the assurance of victory. In the unusual case, where recovery is likely, emotional distress at the economic loss should not be severe, since the loss will presumably be easy to recoup from the blundering counsel. In our judgment a reasonable person, normally constituted, ought to be able to cope with the mental stress of loss of hoped for tort damages without serious mental distress. [Citation.] " (*Merenda, supra,* 3 Cal.App.4th at pp. 10-11.)

Merenda's analysis was followed in *Pleasant v. Celli* (1993) 18 Cal.App.4th 841, 854, disapproved on other grounds in *Adams v. Paul* (1995) 11 Cal.4th 583, 591, fn. 4 [no recovery for emotional distress where attorney allowed statute of limitations to expire in medical malpractice case], *Smith v. Superior Court*, *supra*, 10 Cal.App.4th at pp. 1038-1039 [no recovery for emotional distress where attorney negligence allegedly caused

client to lose community assets in marital dissolution proceeding], and *Camenisch, supra*, 44 Cal.App.4th 1689 [no emotional distress damages against attorney who negligently prepared trust and estate documents, thereby thwarting client's tax avoidance goals].

The client in *Camenisch* had argued that *Merenda* did not apply, since the attorney's negligence did not take place during litigation and that a client preparing a trust does not face the inherent uncertainty of litigation. The court disagreed and concluded that "[p]ublic policy reasons do not support a different result when the alleged malpractice is committed in a tax advice context, even if the tax advice is part of an estate plan. [¶] As in a litigation context, the client's primary protected interest is economic in a tax planning situation. The prospect of paying taxes is generally considered distressing, and the prospect of paying a greater levy than necessary is even more disquieting. However, the emotional upset derives from an inherently economic concern." (*Camenisch, supra,* 44 Cal.App.4th at p. 1697.)

The only case in which an appellate court has upheld an award of emotional distress damages for legal malpractice is *Holliday v. Jones*, *supra*, 215 Cal.App.3d 102. In *Holliday*, attorney negligence contributed to the client's manslaughter conviction and imprisonment. The *Holliday* court found that Holliday's loss of liberty distinguished his case from cases in which the plaintiffs lost only property interests as a result of the attorney malpractice. The court held that the recovery of emotional distress damages in a legal malpractice case should turn on the nature of the plaintiff's interest that has been harmed and not merely on the reprehensibility of the defendant's conduct. (*Id.* at p. 119.)

Roberts argues that her case is distinguishable from *Merenda* and *Camenisch*, since her primary interest was saving her home from foreclosure. She argues that while there were economic aspects to the loss of her home, "the more significant loss was [the] almost complete loss of the life that she had constructed for herself," including the fact that her house was close to her dog-grooming business, the yard had a kennel for her 18 show dogs, the home had sentimental value to her since it was the only home she had

ever owned, and was affordable to her. She analogizes her situation to that of the plaintiff in *Holliday,* who was thrown out of his home by being sent to jail.

Merenda established the rule that emotional distress damages are not generally recoverable in cases of legal malpractice related to litigation. *Camenisch* extended that rule to cases of attorney negligence in the context of tax advice and estate planning. We see no reason to depart from the rule stated in *Merenda* and *Camenisch* when the alleged malpractice is committed in a bankruptcy case.

As in the litigation context and the tax advice context, the client's primary protected interest in a bankruptcy case is economic. The whole purpose of Roberts's bankruptcy filing was to obtain relief from her severe economic situation in which she was having difficulty meeting her financial obligations. Being in debt and filing for bankruptcy are generally distressing. However, the emotional upset derives from an inherently economic concern. The policy of preventing future harm is served by compensating for economic loss when a bankruptcy attorney's advice fails. Adding an emotional distress component to recovery for errors in the handling of a bankruptcy would substantially increase the cost of practicing law and the costs of such services to consumers. We therefore conclude that Roberts was not entitled to recover emotional distress damages as part of her cause of action for legal malpractice and that the trial court did not abuse its discretion in denying her motion to present evidence of her emotional distress.

Roberts also argues that as a matter of public policy, not allowing the recovery of emotional distress damages here "will carve out a special and entirely unjustified rule benefiting only negligent lawyers . . . practicing in the civil area." We disagree. As the Supreme Court observed in *Erlich*, emotional distress damages are not available in every negligence case. (*Erlich, supra*, 21 Cal.4th at p. 554) The rule that emotional distress damages will not be awarded in cases involving only property damage or economic injury has been applied in other contexts. (See, e.g., *Cooper v. Superior Court, supra*,

153 Cal.App.3d at p. 1012 [excavating company whose tractor had damaged plaintiff's home was not liable for emotional distress damages]; *Erlich, supra,* 21 Cal.4th 543 [building contractor who negligently constructed plaintiffs' home not liable for emotional distress]; see also *Devin v. United Services Auto. Assn.* (1992) 6 Cal.App.4th 1149, 1162 and *Branch v. Homefed Bank* (1992) 6 Cal.App.4th 793, 798.) This same argument was rejected in *Smith v. Superior Court, supra*, 10 Cal.App.4th at page 1040.

B. Roberts's Request To Amend Her Complaint to Add a Cause of Action for Intentional Infliction of Emotional Distress

Roberts asserts that the trial court erred in denying her motion to amend her complaint to add a cause of action for intentional infliction of emotional distress.

"The elements of the tort of intentional infliction of emotional distress are: ' "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. . . ." Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.] The defendant must have engaged in 'conduct intended to inflict injury or engaged in with the realization that injury will result.' [Citation.]" (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

The factual premise for Roberts's claim for intentional infliction of emotional distress is the allegation that Calhoun had, during the course of discovery in the malpractice action, misrepresented that dates that the notice of default and notice of sale had been recorded. According to Roberts, Calhoun had asserted that the notice of sale had already been recorded when Roberts sought representation from him. However, documents received shortly before trial of the malpractice action proved that this was not the case. We fail to see how alleged misrepresentations during discovery in the

malpractice action could support a claim for intentional infliction of emotional distress arising out of Calhoun's representation of Roberts in the bankruptcy action.

Other facts which Roberts alleges prove intentional infliction of emotional distress include the fact that Calhoun did not keep the foreclosure notices that Roberts brought him and the fact that he did not recall that he did not ask Roberts to call the foreclosure agent. In our view, the former does not amount to extreme or outrageous conduct that would support a claim for intentional infliction of emotional distress. It is at most negligence. As to the latter ground, Roberts's testimony and Calhoun's testimony differed as to whether he had asked her to contact the foreclosure agent after the second bankruptcy. He says he did. She claims he did not. Rather than support a claim for intentional infliction of emotional distress, this disparity in the parties' testimony goes to their credibility and created a factual issue for the jury to resolve.

In the absence of any factual basis for Roberts's intentional infliction of emotional distress claim, we cannot say the trial court abused its discretion in denying Roberts's request to amend her complaint to state a claim for intentional infliction of emotional distress.

In addition, the trial court did not err in denying the request to amend as untimely. Permission to file an amended pleading on the day of trial is within the trial court's sound discretion. (*Moss Estate Co. v. Adler* (1953) 41 Cal.2d 581, 585.) In this case, Roberts sought to add a new cause of action, for which no discovery had been undertaken, that included a prayer for emotional distress damages, which are generally not recoverable in a legal malpractice action, as well as a claim for punitive damages. The late amendment of the complaint to add these claims would have been prejudicial to Calhoun and the court was well within its discretion to deny the motion to amend on that basis.

C. Calhoun's Claim that the Trial Court Erred in Admitting Any Evidence of Emotional Distress

"Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. [Citations.] Speaking more particularly, it examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question. [Citations.] That is because it so examines the underlying determination as to relevance itself. [Citations.] Evidence is relevant if it has any tendency in reason to prove a disputed material fact. (Evid. Code, § 210.)" (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.)

As noted previously, the trial court initially granted Roberts's motion in limine to present evidence of emotional distress damages as part of her legal malpractice action. After Roberts testified regarding her family background and some abuse by her father and brothers, the court reconsidered its ruling, denied the emotional distress claim, and instructed the jury that emotional distress damages were no longer an element of the case.

We note that the testimony was very general and, for the most part, innocuous. Roberts testified that her family was dysfunctional, that her father was an alcoholic, that her mother could not control her brothers, that her brothers hit her, and regarding the single incident involving the Coke. There was no testimony regarding any emotional distress resulting from the loss of her home.

After the court ruled that Roberts could not recover emotional distress damages, this testimony was no longer relevant. We must therefore determine whether the erroneous admission of this evidence was prejudicial in light of the trial court's instruction to the jury advising them that emotional distress was not an appropriate element of damages.

"The ordinary rule is that the jury is presumed to follow the court's instructions on damages. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 953 . . . [, disapproved of on other grounds in *White v. Ultramar*, *Inc*. (1999) 21 Cal.4th 563, 574, fn. 4].) However, the rule

is not inflexible and may be disregarded where it is clear from the record that the jury failed to follow an instruction. [Citations.]" (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 901.) In this case, it appears the jury followed the court's instruction and did not consider any allegations of emotional distress in arriving at its award. In closing argument, Roberts's attorney asked the jury to award Roberts $112,000 for the loss of the house, $33,500 in interest, and $40,504 for her motel, travel, and storage expenses, for a total award of $185,974. Roberts did not ask for an award of emotional distress damages. Calhoun argued that Roberts's damages were only $43,000, her net equity in the house. The jury awarded Roberts $177,784. The special verdict form, which was stipulated to by both sides, did not ask the jury to list the components of its damages award. Nonetheless, based on the amount of the award, it does not appear that the jury made any award for emotional distress.

When Calhoun raised this issue in his motion for new trial, he did not present any evidence that the jury impermissibly considered Roberts's family background or emotional distress resulting from the loss of her home in arriving at its verdict. Calhoun's motion did not include declarations from any of the jurors. The only evidence on the issue was a hearsay declaration from Calhoun's attorney in which he stated: "In discussing the case with the jurors after the verdict, two jurors stated to me that they thought [Roberts] had been victimized, and that they therefore thought she should be awarded a verdict in her favor." Even if we were to accept this hearsay declaration as true, it does not indicate that the jurors impermissibly considered Roberts emotional distress in arriving at their verdict. At most it shows that they thought she was a victim of Calhoun's malpractice.

II. Other Issues Raised by Calhoun's Appeal

A. Propriety of Damages Award for Motel, Transportation, and Storage Expenses

Calhoun asserts that he is entitled to a new trial because the jury's award of motel, transportation, and storage expenses was speculative. He claims that Roberts's testimony regarding these expenses was "halting, confused, and imprecise" and based on documents that were "incomplete and never properly authenticated." He criticizes Roberts's testimony as vague and faults her for not producing "receipts, cancelled checks, or charge card slips supporting her testimony." Calhoun essentially challenges to the sufficiency of the evidence.

On appeals challenging the sufficiency of the evidence, appellate courts apply the substantial evidence rule, which provides that the trial court's resolution of disputed factual issues must be affirmed so long as supported by substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

At trial, Roberts produced records from a Motel 6 that documented that she had stayed at the motel on 47 occasions. Calhoun objected to the introduction of the documents on the grounds of hearsay and lack of foundation. His objection was sustained. However, the trial court permitted Roberts to use the documents to refresh her memory. Relying on the documents, Roberts testified that she stayed at the Motel 6 on 47 occasions between January 1, 1999 and the time of trial and paid $73 or $74 per night. Roberts also produced two receipts from the Easy 8 Motel for $82.14. She testified that when she first started staying at the Easy 8 the cost was $63 or $64 per night, but that the cost went up as time went by. She estimated that she spent 80 or 90 nights at the Easy 8 in 1998. From January 1999 until the time of trial, she estimated that she stayed at the Easy 8 three nights for every two nights that she was at the Motel 6.

As for transportation costs, Roberts testified that after she moved to Tracy, she traveled to work both by car and train. She spent $350 per month on automobile

expenses and $204 to $208 on commuter train tickets. She lived in Tracy for 24 or 25 months prior to trial.

As for storage fees, Roberts had a packet of documents from Lock-It-Up Storage in Cupertino. Calhoun objected to the documents coming into evidence. The objection was sustained. However, Roberts used the documents to refresh her memory. Roberts testified that she had rented one storage unit in Cupertino at a cost of $220 per month for a year to a year and a half starting in August 1998. She also purchased storage from Door-to-Door Storage in Fremont at a cost of $180 per month for 21 months. After that, she moved the items that were in Fremont to a second storage unit in Cupertino. She rented that space for about three months. In October and November of 2000, she moved the items that were in storage in Cupertino to a storage facility in Tracy at a cost of $360 per month.

In closing, Calhoun suggested the jury view Roberts's testimony regarding the motel, transportation, and storage expenses with caution because she did not produce the strongest evidence that she had actually incurred the charges. He faulted her for not producing receipts, credit card charge slips, or cancelled checks. He also suggested that she could not have afforded to incur these costs, based upon her income for 1998 and 1999[3] and argued that he was entitled to an offset against these extra charges for the amount of her ordinary living expenses.

Although Roberts's recall was not precise as to all of the details, she was able to provide considerable detail regarding the additional expenses she incurred. Although she did not have documentary evidence to corroborate her testimony, in our view none was required. It was up to the jury to decide how much weight to give her testimony absent documentary support. Furthermore, Calhoun did not introduce any evidence that contradicted or impeached Roberts's testimony regarding her damages.

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[3] Roberts had shown a net loss on her income tax returns for both years.

Our analysis of this issue is complicated by the fact that the record does not indicate how much the jury awarded for motels, transportation, and storage. The special verdict form that the parties stipulated to asked the jury to determine the total amount of Roberts's damages, without any reduction for her comparative negligence. It did not ask the jury to break down the damages award into its component parts. The appellant has the burden of providing us with an adequate record that demonstrates error. If the record is inadequate for meaningful review, the judgment should be affirmed. (*Gee v. American Realty & Construction, Inc*. (2002) 99 Cal.App.4th 1412, 1416.)

Roberts asked the jury to award $112,000 for the loss of the house, $33,500 in interest, and $40,504 for her motel, travel, and storage expenses, for a total of $185,974. The jury awarded her $177,784, $8,190 less than the amount requested. Since the parties did not ask the jury to break down its award, we have no way of knowing how much the jury awarded for the motel, travel, and storage expenses, as opposed to the other elements of damages requested. Based on our calculations, the evidence outlined above more than supports an award of $40,504, the amount requested by Roberts for this category of damages. We therefore conclude that the award of damages for motel, travel, and storage expenses was supported by substantial evidence.

B. Prejudgment Interest

Calhoun asserts that the trial court erred in allowing Roberts to recover damages for prejudgment interest, since she did not seek prejudgment interest in her complaint. He also asserts that if prejudgment interest is to be allowed, it should run from the date of the filing of the complaint (June 21, 1999) and not from the date of foreclosure (July 6, 1998) as set forth in the court's jury instruction. We disagree as to both points.

"It has long been settled that, in a contested action, prejudgment interest may be awarded even though the complaint contains no prayer for interest. [Citation.]" (*Newby v. Vroman* (1992) 11 Cal.App.4th 283, 286.) It has also been held that "[a] general

prayer in the complaint is adequate to support an award of prejudgment interest. 'No specific request for interest need be included in the complaint; a prayer seeking "such other and further relief as may be proper" is sufficient for the court to invoke its power to award prejudgment interest. [Citations.]' [Citations.]" (*North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 829.) Robert's complaint included a prayer for "costs of suit; such relief as is fair, just, and equitable; and for compensatory damages." In our view, this was sufficient to support an award of prejudgment interest.

In addition, Roberts moved in limine to amend her complaint to state a claim for prejudgment interest. The trial court granted that motion. In light of the authority set forth above, we cannot say that the trial court abused its discretion in granting Roberts's motion to amend her complaint to state a claim for prejudgment interest.

As to Calhoun's second contention that interest should run from the filing of the complaint, not the date of foreclosure, we begin by examining the statutes that authorize awards of prejudgment interest.

Civil Code section 3287, subdivision (a)[4] authorizes prejudgment interest on damages certain or capable of certainty through calculation (i.e., liquidated damages), regardless of the type of action involved. (Civ. Code § 3287, subd. (a); *Segura v. McBride* (1992) 5 Cal.App.4th 1028, 1040 (*Segura*); *Levy-Zentner Co. v. Southern Pac.*

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[4] All further statutory references are to the Civil Code, unless otherwise specified. Section 3287 provides: "(a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state. [¶] (b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed."

Transportation Co. (1977) 74 Cal.App.3d 762, 794-798.) It provides that the party entitled to prejudgment interest may recover the interest from the date the right to recover the damages that the interest is based on vested in him or her. (Civ. Code, § 3287, subd. (a).) If the amount of damages is contested and cannot be resolved except by verdict, as was the case here, an award of prejudgment interest is not available under section 3287, subdivision (a). (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958-960.)

Subdivision (b) of section 3287 authorizes prejudgment interest in cases involving unliquidated contract claims. (*Segura, supra*, 5 Cal.App.4th at p. 1040.) As to the timing of the award, section 3287, subdivision (b) provides that interest is owed "from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed." Since this is a tort action for attorney negligence, the rule stated in section 3287, subdivision (b) does not apply.

Section 3288 provides: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." "The party seeking interest under this statute need not prove both a breach of a noncontractual obligation as well as oppression, fraud or malice. [Citation.] Moreover, the trier of fact may award prejudgment interest even if plaintiff's damages are not liquidated. [Citation.]" (*Segura, supra*, 5 Cal.App.4th at p. 1040.)

Roberts's claim was for unliquidated damages on an action other than contract and therefore comes within the purview of section 3288. Section 3288 does not contain a provision regarding the timing of the award of prejudgment interest, as do subdivisions (a) and (b) of section 3287. However, it has been held that where prejudgment interest is awarded under section 3288 in order to compensate the plaintiff fully for the loss, the interest must be calculated from the date of the tortious act proximately causing the plaintiff's damages. (*Newby, supra*, 11 Cal.App.4th at p. 289.) In this case, that would

be the date of the foreclosure sale. We therefore reject Calhoun's assertion that interest should have been awarded from the date of the filing of the complaint.[5]

C. Comment by Prospective Juror Regarding Malpractice Insurance

Calhoun asserts that during voir dire, a prospective juror stated that she thought she knew Calhoun because she worked for a company that provided his malpractice insurance. However, Calhoun never carried malpractice insurance. The latter fact was brought to the court's attention outside of the presence of the jury. The court then admonished the jury that insurance was not an issue in the case.

The jury was instructed with BAJI No. 1.04, the standard instruction regarding insurance coverage, as follows: "There is no evidence before you that the defendant has or does not have insurance for the plaintiff's claim. Whether such insurance exists has no bearing upon any issue in the case. You must not discuss or consider it for any purpose." Calhoun asserts that once the subject of insurance was raised, the jury should have been instructed that he did not have any malpractice insurance. We disagree, for a variety of reasons.

First, there is no record of the challenged proceedings that allows us to review this issue. Calhoun has failed to provide us with a reporter's transcript of the jury voir dire. Error is not presumed on appeal. On the contrary, the judgment is presumed to be correct and the appellant has the burden of overcoming this presumption by affirmatively showing error on an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1320-1321.) We do not have a record of the prospective juror's comment or the trial court's admonition to the panel. We have no information regarding the context in which the remark was made or the

[5] Our analysis of this issue has been conducted in somewhat of a vacuum, since the verdict form does not indicate how much of the $177,784 the jury awarded Roberts was for prejudgment interest.

extent of the discussion of insurance. Calhoun's failure to provide an adequate record on this issue requires that it be resolved against him. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

Second, although Calhoun now asserts that the trial court should have instructed the jury that he did not have insurance, there is no evidence that he requested such an instruction at the time of trial. Prior to closing arguments, the parties met with the court in an unreported chambers conference to discuss jury instructions. The court subsequently gave the attorneys an opportunity to state their objections to the instructions on the record. At that time, the parties stipulated to the use of BAJI No. 1.04, the standard instruction regarding insurance. (BAJI No. 1.04.) Calhoun did not object. We therefore conclude that Calhoun has waived any objection to the instruction for the purpose of this appeal.

Furthermore, Calhoun provides no authority to support of the notion that he was entitled to have the jury instructed that he did not have insurance. When an appellant asserts a point but fails to support it with reasoned argument and citation to authority, this court may treat it as waived and pass it without consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) In fact, there is authority contrary to Calhoun's contention. Whether the defendant's loss is covered by insurance is not germane to an action asserting the defendant's liability and evidence on the issue is irrelevant. (*Schaefer/Karpf Productions v. CNA Ins. Companies* (1998) 64 Cal.App.4th 1306, 1313.) Furthermore, advising the jury that Calhoun did not have insurance may have created sympathy for him and resulted in prejudice to Roberts. The trial court properly instructed the jury that insurance did not have any bearing on the case.

For all of these reasons, we conclude that it was not error for the court not to instruct that Calhoun did not have insurance.

D. Jury Instruction Regarding Elements of Roberts's Malpractice Claim

The final issue raised by Calhoun relates to the jury instruction on Roberts' burden of proof at trial. The jury was instructed with a modified version of BAJI No. 6.37.5[6] that "[i]n order to recover damages from an attorney for negligence in the handling of her Chapter 13 bankruptcy case, the plaintiff must not only establish that the attorney was negligent but must also establish the but for such negligence *a foreclosure sale of the plaintiff's home would not have been completed*." (Italics added.)

Calhoun objected to this instruction and asked the court to add the following language: " 'In this case plaintiff claims the defendant's negligence in handling her bankruptcy case caused her to lose her home by a foreclosure sale,' . . . [¶] Plaintiff has the burden of proving by a preponderance of evidence all the facts necessary to establish that if defendant had corrected the mistakes or refiled the bankruptcy before the foreclosure, that plaintiff would have been successful in her bankruptcy." The court denied his request reasoning that this was "too pinpoint an instruction."

Calhoun makes a similar, but different argument on appeal. He argues that the trial court should have instructed that "[i]n order to recover damages from an attorney for negligence in the handling of a lawsuit, the plaintiff must not only establish that the attorney was negligent but must also establish the but for such negligence the plaintiff would have successfully completed her bankruptcy plan." Essentially, he asserts that the phrase "a foreclosure sale of the plaintiff's home would not have been completed" in the

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[6] The standard language for BAJI No. 6.37.5 is: "In order to recover damages from [an attorney] for negligence in the handling of a lawsuit, which negligence resulted in the plaintiff's loss of the prior lawsuit, the plaintiff must establish: [¶] 1. The [attorney] was negligent in the handling of the prior lawsuit; [¶] 2. That negligence was a cause of the plaintiff's loss of the prior lawsuit; and [¶] 3. The proper handling of the prior lawsuit by the professional would have resulted in [a collectible judgment] [the lawsuit being successfully defended]."

instruction that was given should have been replaced by the phrase "the plaintiff would have successfully completed her bankruptcy plan."

Calhoun contends that there was evidence that Roberts had never gone 60 consecutive months (the length of her bankruptcy plan) without falling behind in her mortgage payments and that her income was declining over the years, "making it even more unlikely that she could have successfully completed her plan." While the court refused to instruct as Calhoun requested, it permitted him to argue the point to the jury.

Since the instruction that Calhoun advocates on appeal is different from what he asked for in the trial court, we must first consider whether there has been a waiver of this argument on appeal. An appellant cannot claim error in the failure to give a particular jury instruction where the appellant did not request that the instruction at issue be given. (*Hilts v. County of Solano* (1968) 265 Cal.App.2d 161, 171; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2002) ¶ 8:266, pp. 8-123 to 8-124.) We agree with the trial court that the instruction Calhoun requested at trial was too pinpoint of an instruction. However, the court never had an opportunity to consider the instruction Calhoun advances on appeal. We conclude that Calhoun's failure to request the instruction he now advocates waived the issue on appeal. However, even if Calhoun had properly raised this claim of instructional error, we conclude that the instruction that was given was correct.

One of Calhoun's defenses was that Roberts would not have successfully completed her bankruptcy. Roberts, on the other hand, testified that while she was in bankruptcy, she had always made the payments due under the plan. In addition, Roberts's expert testified that she had options other than involuntary foreclosure, in the event she found herself unable to complete her bankruptcy plan, including modifying the existing plan or filing an new bankruptcy petition that included a voluntary sale of the property as part of the plan. Roberts had sought Calhoun's assistance in order to prevent foreclosure of her home. In light of the evidence in the case, the trial court did not err in

instructing the jury that Roberts had to prove that her house would not have been lost in a foreclosure sale as opposed to proving that she would have been successful in bankruptcy.

III. Additional Issues Raised by Roberts's Cross-Appeal

A. Exclusion of Evidence of Tax Consequences of Damages Award

On the third day of trial, Roberts made a motion outside of the presence of the jury to introduce evidence, by way of expert opinion, of the amount of money she would have to recover to compensate her for the fact that she will have to pay taxes on any judgment in the case. She argued that if she had sold her property in a non-foreclosure sale she would not have had to pay taxes on any capital gains (26 U.S.C. 121) but that she will be required to pay taxes on any judgment realized in the legal malpractice action against Calhoun. She asserted that she was entitled to an additional award to allow for the fact that she would have to pay taxes on the judgment in the malpractice action. Roberts submitted an offer of proof in the form of a report from forensic economist Kirk Blackerby. Blackerby opined that Roberts would have to recover $176,311 to compensate her for the loss of $111,600 in equity in her home plus the taxes on that amount. The trial court denied Roberts's motion and Blackerby did not testify.

Roberts renews her argument on appeal. She contends that "[f]or the purpose of making her . . . whole . . . the tax consequences of an award are an inescapable part of her damages."

The Restatement Second of Torts instructs: "The amount of an award of tort damages is not augmented or diminished because of the fact that the award is or is not subject to taxation." (Rest.2d Torts, § 914A, p. 494.) As the court observed in *Rodriguez v. McDonnell Douglas Corp*. (1978) 87 Cal.App.3d 626, 664 (*Rodriguez*), "[t]here is little decisional law in California on this subject." This rule has most often been applied

to damages awards in personal injury cases. (See, e.g., *Mackey v. Campbell Construction Co*. (1980) 101 Cal.App.3d 774, 789; *Rodriguez, supra,* 87 Cal.App.3d at pp. 664-668; *Henninger v. Southern Pacific Co*. (1967) 250 Cal.App.2d 872; *Atherley v. MacDonald, Young & Nelson* (1956) 142 Cal.App.2d 575, 589.)

Roberts does not cite a single case that addresses this issue in a legal malpractice case or any non-personal injury case and we have found none.

Roberts relies on *BT-1 v. Equitable Life Assurance Society* (1999) 75 Cal.App.4th 1406, 1410, footnote 3 (*BT-1*), for the proposition that a plaintiff may claim tax damages. We do not find the citation persuasive. *BT-1* was an action by a limited partner against the general partner of a limited partnership for breach of contract, breach of fiduciary duty, and breach of the covenant of good faith and fair dealing. The court held that a partnership agreement cannot relieve a general partner of its fiduciary duty to the limited partner and the partnership where the purchase and foreclosure of a partnership debt is involved. (*Id.* at p. 1410.) The limited partner had sought to recover $5 million in damages, including damages that resulted from being forced to recognize a taxable gain in 1995, as opposed to some later date. (*Id.* at p. 1410.) The court did not address the propriety of such damages in its opinion. It merely noted that the taxable gain was one of the elements of damages the plaintiff sought. Cases are not authority for propositions not discussed or considered. (*People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 65-66.) *BT-1* is also distinguishable from this case since it was a contract action, not a tort action. Roberts's reliance on *BT-1* is therefore misplaced.

Roberts also cites *Camenisch, supra,* 44 Cal.App.4th at page 1698, footnote 6. *Camenisch* was an action for legal malpractice in which the plaintiff alleged that the attorney was negligent in preparing trust and estate documents and that, as a result of the attorney's negligence, the client had to pay $25,000 in taxes that were avoidable and his estate might have to pay another $525,000 in taxes if he died within the next three years. (*Id*. at p. 1692.) The issue on appeal was whether the client was entitled to damages for

emotional distress due to the lawyer's negligence. Denying the client's request for emotional distress damages, the court observed: ". . . [The client's] interest was avoiding taxes to the estate. . . . Recovery of economic damages for taxes incurred by the estate protects the primary interest of both [the client] and his heirs." (*Id.* at p. 1698, fn. 6.) The taxes at issue in *Camenisch* were taxes that the client had to pay as a direct result of the lawyer's negligence. Roberts on the other hand seeks to obtain additional damages to cover the taxes that she will have to pay on her recovery in the malpractice action. *Camenisch* does not address the issue presented here and does not persuade us that we should depart from the rule set forth in section 914A of the Restatement Second of Torts, that a damages award should not be increased or decreased because it is or is not taxable.

Shortly before oral argument, Roberts drew our attention to *Blaney v. International Association of Machinists and Aerospace Workers, District No. 160* (2002) 114 Wash.App. 80 (*Blaney*). In *Blaney*, the Washington Court of Appeal held that a plaintiff in a gender discrimination action under the Washington Law Against Discrimination (WLAD) was entitled to recover damages for the income tax consequences of a compensatory damages award as a component of " 'actual damages' " awardable under the WLAD. The court's opinion turned on its interpretation of the phrase " 'actual damages' " in the statute (RCW 49.60.030(2)). (*Blaney, supra*, 114 Wash.App. at pp. 92-101.) The court observed that whether tax consequences are damages is a matter of state law and limited its holding to discrimination cases under the WLAD. (*Id.* at pp. 94, 100.)

We are not persuaded that the rule set forth in *Blaney* applies in this case. First, we are not bound to follow the rulings of the Washington Court of Appeals. Second, the *Blaney* court was interpreting a statute governing a statutorily-created cause of action for discrimination and specifically limited its holding to such cases. Nothing in *Blaney* persuades us that its holding applies to an action for legal malpractice.

We therefore conclude that the trial court did not err when it denied Roberts's motion to introduce evidence of the tax consequences of any damages award.

B. Valuation Date

At trial, Calhoun moved in limine to exclude evidence of the fair market value of the property at the time of trial and argued that Roberts's loss should be measured as of the date of the foreclosure sale. The court granted the motion and found that damages were to be calculated as of "the time of the foreclosure sale, and that's between May 20, 1998 and July 14, 1998, not the date . . . of the trial."

On the fourth day of trial, Roberts submitted additional points and authorities on the question of the proper valuation date and asked the court to revisit the issue. The trial court denied the motion as untimely. The court also held that even if the motion was timely, any claim that Roberts would have held on to the property until the day of trial was speculative and denied Roberts's motion to have damages valued as of the date of trial.

The general rule regarding the proper measure of damages in a legal malpractice action is that the "plaintiff is entitled only to be made whole: i.e., when the attorney's negligence lies in his [or her] failure to press a meritorious claim, the measure of damages is the value of the claim lost. [Citation.]" (*Smith v. Lewis* (1975) 13 Cal.3d 349, 361-362, disapproved on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851, fn. 14.) "[A]n attorney's 'liability, as in other negligence cases, is for all damages directly and proximately caused by his [or her] negligence.' " (*Smith v. Lewis, supra,* 13 Cal.3d at p. 362.) "This rule is simply in keeping with the general rule of tort damages: an injured party may recover for all detriment proximately caused whether it could have been anticipated or not. (Civ. Code, § 3333.)" (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 979.)

In a legal malpractice action, an injury consists of "the loss of a right, remedy or interest, or the imposition of a liability. Damages concern the measure of that injury." (3 Mallen & Smith, Legal Malpractice (5th ed. 2000) Damages, § 20.1, p. 119 (hereafter "Mallen").) "[D]irect damages are compensation for the loss of the expected benefits from the attorney's services and any expenses incurred due to the attorney's failure to achieve those benefits. The direct damage usually is the value of the lost benefit or of the detriment. The value of that benefit is based on the circumstances existing *at the time of the wrongful act or omission*." (*Id.* at p. 120, fns. omitted, italics added.) "[T]he measure of damages is the difference between what the plaintiff's pecuniary position is and what it should have been had the attorney not erred. The measure of damages necessarily depends on the nature of the attorney's undertaking for the client. The injury is measured at the time of the attorney's error." (*Id*. at § 20.4, p. 129, fns. omitted.)

Under the rule set forth in Mallen, Roberts' damages should be valued as of the date of the foreclosure in July of 1998. By arguing that her damages should be evaluated as of the time of the trial in May of 2001, Roberts hopes to recover for the appreciation in property values during the almost three year period between the time of the foreclosure sale and the time that her case went to trial.

Roberts relies on *Safeco Ins. Co. v. J & D Painting* (1993) 17 Cal.App.4th 1199 (*Safeco*). *Safeco* was a subrogation action. Safeco sued J & D Painting (J & D) for negligently causing a fire at the home of one of its insureds, H. Tim Hoffman. Safeco sought to recover $266,618.81 it had paid Hoffman for repairs and loss of use. Safeco settled with J & D. Hoffman filed a separate complaint against J & D, alleging that his property had depreciated by $300,000 during the five months that it took to repair the property and seeking damages for the diminution in value of the property. (*Id.* at pp. 1201-1202.) The court observed that the proper measure of damages for negligent damage to real property is the lesser of the cost of repairs or diminution in value, but not both. (*Id.* at p. 1202.) One recognized exception to this rule is the " 'personal reasons

exception.' " Under that exception, the court will award the cost of repair, even if it is greater than diminution in value, where the plaintiff shows the lost value to him is greater than the diminution in value and that the repairs will be made. (*Id.* at p. 1203.) Hoffman argued that the court should recognize an analogous exception where the diminution in value is greater than the cost of repair. The court of appeal disagreed. It observed that there was not a single case from this or another jurisdiction that awarded damages for a lost opportunity to sell at a higher price. It also reasoned that damages must be proximately caused by the defendant's conduct, that the changes in the real estate market was a superceding cause that the defendant could not have foreseen, and that there was no causal connection between the changes in the market and the defendant's conduct. (*Id.* at pp. 1204-1205.)

Roberts's reliance on *Safeco* is misplaced. We fail to see how the court's conclusion that there was no causal connection between the defendant's conduct and changes in the real estate market supports Roberts's argument. On the contrary, it supports the conclusion that there was no causal connection between Calhoun's malpractice and the appreciation in property values that occurred during the three years prior to trial in this case. As noted before, a negligent attorney is only responsible for damages that are proximately caused by his or her negligence.

Roberts also relies on *Estate of Anderson* (1983) 149 Cal.App.3d 336, 353-355 (*Anderson*). In *Anderson*, the life beneficiaries of a trust established by their decedent's will objected to an accounting filed by the executor of the decedent's estate, a bank. The trust beneficiaries challenged the bank's sale of a portion of the decedent's large property to satisfy the estate's tax liability. The Court of Appeal concluded that the bank had committed extrinsic fraud in selling the property and that the trust beneficiaries were entitled to equitable relief. The court also concluded that the trial court did not err in awarding damages based on the value of the property at the time of trial, including the appreciation in the value of the property since the time of the sale.

The *Anderson* court's analysis was based on its interpretation of former Civil Code section 2238, subdivision (a), which provided for a specific remedy where the trustee disposes of trust property in a manner not authorized by the trust, but in good faith. Civil Code section 2238, subdivision (a) was repealed in 1986 and replaced by Probate Code section 16440 [measure of liability for breach of trust]. (Stats. 1986, ch. 820, § 7, p. 2730 [repealing former Civil Code section 2238]; Stats. 1986, ch. 820, § 40, pp. 2750, 2783 [enacting Probate Code section 16440].) The *Anderson* court also stated: "Further support can be found in the general tort measure of damages found in Civil Code section 3333 since this case presents elements of tortious nondisclosure and fraud. In such a case, the measure of damages is 'the amount which will compensate for all the detriment proximately caused thereby . . . .' Given the history and use of the subject real property, objectors would probably have retained it in the family at least long enough to enjoy its appreciated value to the time of trial." (*Anderson, supra,* 149 Cal.App.3d at p. 355.) In light of the *Anderson* court's focus on the statutory scheme governing the liability of a trustee and the other authorities cited above, we are not persuaded that *Anderson*'s holding regarding appreciation damages should be applied in a legal malpractice case and decline to do so.

Policy reasons also favor evaluating Roberts's damages as of the time of the foreclosure. As noted above, Calhoun is only responsible for those damages that are proximately caused by his negligence. Calhoun was not responsible for the changes in the real estate market between 1998 and 2001, a period of unprecedented growth in real estate values in Santa Clara County. To allow Roberts to recover additional damages due to the appreciation in her property after it was sold in foreclosure would encourage plaintiffs to delay prosecution of their actions in the hope that property values would increase.

For these reasons, we conclude that the trial court did not err in ruling that Roberts's damages be valued as of the foreclosure date.

C. Roberts's Motion for Attorney Fees

During discovery, Roberts propounded requests for admissions (RFA's) of the truth of 24 facts on Calhoun. On October 19, 2000, Calhoun admitted 14 and denied 10 of the facts set forth in the RFA's. In particular, Calhoun denied that his representation of Roberts "fell below the standard of care for bankruptcy lawyers in Santa Clara County" (RFA No. 23) and that his representation of Roberts "caused her to suffer damages" (RFA No. 24).[7] At the time that he prepared his responses to the RFA's, Calhoun was in pro per. He subsequently obtained counsel.

Calhoun was deposed on February 12, 2001. At deposition, Calhoun admitted several of the facts that he had denied in his responses to the RFA's. Calhoun's expert, Greene, was deposed on April 10, 2001, six weeks before trial. According to Roberts, Greene testified in deposition that a number of Calhoun's actions did not meet the standard of care for bankruptcy attorneys in Santa Clara County, thereby contradicting Calhoun's response to RFA No. 23.

After the trial, Roberts made a motion for attorney fees and costs pursuant to Code of Civil Procedure section 2033, subdivision (*o*), on the grounds that Calhoun had failed to admit the 10 facts that he had denied in his responses to the RFA's and that Roberts

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[7] Calhoun also denied that Roberts hired him "to do all legal work necessary in a Chapter 13 bankruptcy, with the object of preventing foreclosure on her home" (RFA No. 4); that he had "assured . . . Roberts that her home was secure if she fulfilled all requirements of Chapter 13' (RFA No. 6); that he had failed to file a pre-hearing conference statement in the second bankruptcy action prior to April 20, 1998 (RFA No. 9); that he did not mail Roberts "any amended schedules pertaining to her Chapter 13 bankruptcy" (RFA No. 10); that he did not appear at the prehearing conference on April 20, 1998 (RFA No. 11); that he did not prepare any amendments to the second bankruptcy to met the trustee's objections in that case (RFA No. 13); that he received the trustee's final report and account in June 1998 (RFA No. 15); and that he did not file any amendments to meet the objections of the trustee until after the second bankruptcy was dismissed (RFA 16).

had proven those facts at trial. Roberts requested $49,77.35, $41, 017.50 of which was for attorney fees.

Code of Civil Procedure "[s]ection 2033, subdivision (o) authorizes the court to award costs including attorney fees incurred by a party in proving any mater where the proof is necessitated by an opposing party's denial of a request for admission." (*Wagy v. Brown* (1994) 24 Cal.App.4th 1, 6.) It provides in relevant part: "If a party fails to admit . . . the truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make this order unless it finds that (1) an objection to the request was sustained or a response to it was waived under subdivision (*l*), (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter, or (4) there was other good reason for the failure to admit." (Code Civ. Proc., § 2033, subd. (*o*).)

Calhoun opposed the motion. He argued that Roberts's fee request was improper, since "[f]rom the inception of trial [he] admitted the mistake he made and contended the trial was only about damages." He also explained the various denials in the RFA's and argued that he denied some of them because he did not have the information necessary to admit or deny the request in October 2000 and that he had subsequently admitted some of the facts in his deposition. He also argued that proof of the facts he had denied consumed very little of the trial time and that the primary issues at trial were causation and damages. He also asserted that certain expert fees claimed by Roberts were not recoverable under Code of Civil Procedure section 2033,subdivision (*o*), since the experts consulted never testified at trial, and that a reasonable fee, if fees are to be awarded, was $1520.

In reply, Roberts's conceded that some of the attorney fees and costs were inappropriate and reduced her request to $33,122.50 for attorney fees and $3,844.45 for costs, for a total of $40,700.66.

The trial court granted Roberts's motion in part. It found that Calhoun had good cause to deny RFA No. 23, which asked him to admit that his representation of Roberts fell below the standard of care, and RFA No. 24, which asked him to admit that Roberts had suffered damages due to his representation, because his expert had testified that the expert's reaction to the situation presented here was above the standard of care. The court also found that Calhoun had admitted RFA's Nos. 15 and 16 and adequately explained the reasons for his denial of the other RFA's at the time of his deposition. The court observed that Calhoun had "admitted everything" in chambers and had offered to stipulate to certain matters and that the court had asked the parties to meet and confer further on the issue but that when they returned, they had nothing to report. The court found that the only additional expense incurred as a result of Calhoun's denial of the RFA's was $79 in copying costs, to which Calhoun had stipulated. The court awarded Roberts $79 on the motion.

"The determination of whether a party is entitled to expenses under section 2033, subdivision (o) is within the sound discretion of the trial court. 'On appeal, the trial court's decision will not be reversed unless the appellant demonstrates that the lower court abused its discretion.' [Citation.] '[O]ne of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. . . .' [Citation.]" (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 637, fn. 10 (*Wimberly*).)

" ' [A]lthough the principal aim of discovery procedures in general is to assist counsel to prepare for trial, requests for admissions are conceived for the purpose of setting to rest triable issues in the interest of expediting trial.' [Citation.]" (*Wimberly, supra,* 56 Cal.App.4th at p. 634.) "Indeed, Witkin goes so far as to say that an RFA 'is *not a discovery device*. Its objective is the same as that of the pretrial conference: [t]o

obtain admissions of uncontroverted facts learned through other discovery methods, and thereby to narrow the issues and save the time and expense of preparing for unnecessary proof.' (2 Witkin, Cal. Evidence (3d ed. 1986) Discovery and Production of Evidence, § 1553, p. 1506, italics in original; but see Code Civ. Proc., § 2019, subd. (a) ['[a]ny party may obtain discovery by one or more of the following methods . . . [¶] . . . [¶] (5) Requests for admissions'].) A matter admitted in response to an RFA is 'conclusively established against the party making the admission' unless by noticed motion the party obtains leave of court to withdraw or amend the response. (Code Civ. Proc., § 2033, subds. (m) & (n).)" (*Burch v. Gombos* (2000) 82 Cal.App.4th 352, 358-359, fn. omitted.) We note that Code of Civil Procedure section 2033 does not contain a similar provision regarding matters that have been denied.

Roberts had the burden of proof on the motion for attorney fees. There was no evidence that Calhoun knew what Greene was going to say regarding the standard of care when Calhoun responded to the RFA's in October 2000. At that time, he was not represented by counsel. There was no evidence that he had retained an expert at that point. When taking expert depositions, attorneys routinely ask expert witnesses when they were retained when taking their depositions. (See Kennedy & Martin, Cal. Expert Witness Guide (Cont.Ed.Bar 2d ed. 1991) §§ 11.7, 11.10, pp. 343, 348.1-349.) Roberts presented no evidence as to when Greene was retained or when Calhoun learned the substance of Greene's testimony. Furthermore, Calhoun did not have an on-going duty to update his RFA responses after they were served on Roberts. (*Burch v. Gombos, supra*, 82 Cal.App.4th at p. 359.)

All of the RFA's that Calhoun denied, except for RFA No. 24, asked for admissions relating to the legal work that Calhoun had done for Roberts and were therefore related to the issue of Calhoun's alleged breach of the standard of care. In spite his earlier denials, by the time of trial, Calhoun was willing to admit that he had breached the standard of care. According to his counsel, the issues that remained to be tried were

causation and damages. The parties discussed this in chambers and the court suggested that they enter into a stipulation on the issue of the breach of the standard of care to narrow the issues for trial. However, the parties never reported back to the court with a stipulation. In his remarks during the hearing on the motion for attorney fees, the trial court questioned the need for Roberts to prove a breach of the standard of care, in light of Calhoun's offer to stipulate on the issue. Since the primary function of RFA's is to narrow the issues before trial, we do not think the trial court abused its discretion in denying Roberts an award of attorney fees, where she had an opportunity to stipulate regarding the issues covered by the RFA's but elected to present evidence on the issue instead.

For these reasons, we conclude that the trial court did not abuse its discretion in granting the motion for attorney's fees and costs in part.

DISPOSITION

The judgment is affirmed. The trial court's order on the motion for attorney fees is also affirmed. Each party to bear his or her own costs on appeal.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.